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JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF
11 SPOKANE a/k/a THE CATHOLIC
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

14 Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF
17 SPOKANE, et al.,

Defendants.

ST. FRANCIS XAVIER PARISH'S
OPPOSITION TO
SUMMARY JUDGMENT

19 St. Francis Xavier Parish and its Parishioners ("St. Francis Xavier"), in opposition to
20 the Tort Litigant Committee's (the "Committee") Motion for Summary Judgment (Docket
21 Nos. 63-67, 72), submits the following memorandum of law. This memorandum
22 incorporates and is supported by the Affidavit of the Reverend Daniel Barnett, the Affidavit
23 of Eleanor Finley, Parishioner, and Defendants' Omnibus Statement of Facts (LR 7056).
24 St. Francis Xavier also adopts and incorporates those Affidavits filed by other Defendants
25 opposing Plaintiff's Motion.
26

ST. FRANCIS XAVIER PARISH'S OPPOSITION
TO SUMMARY JUDGMENT - 1

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I.

RELIEF REQUESTED

The Committee's attempt to deny St. Francis Xavier its ownership interest in real property that St. Francis Xavier paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to St. Francis Xavier;

2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from St. Francis Xavier, a non-debtor; and

3. St. Francis Xavier's equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive St. Francis Xavier of fundamental property rights and religious freedoms must be denied.

II.

PROCEDURAL HISTORY

A. The Bankruptcy

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including St. Francis Xavier. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor St. Francis Xavier disputes this particular trust relationship.

1 **B. Appointment of Creditors Committee**

2 On February 2, 2005, the Court entered an Order duly approving the appointment of
3 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who
4 filed complaints against the Diocese in the Superior Court of the County of Spokane, State
5 of Washington. Neither the Committee nor its members have asserted a claim in State
6 Court against St. Francis Xavier or identified any legal relationship with St. Francis Xavier.

7 The legal standing of the Committee to seek declaratory relief against non-debtors in
8 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

9 **C. The Adversary**

10 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in
11 this adversary proceeding ("Adversary Proceeding"), specifically:

- 12 • FIRST CAUSE OF ACTION
(Declaratory Relief: The Disputed Real Property)
- 13 • SECOND CAUSE OF ACTION
(Declaratory Relief: the Disputed Personal Property)
- 14 • THIRD CAUSE OF ACTION
(Declaratory relief: Substantive Consolidation)
(Docket No. 1, Complaint)

15 Although property is allegedly "disputed," the Committee does not have or assert a
16 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

17 The relief sought by the Committee is drafted as equitable, although it is clearly of
18 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 19 1. Declaring that the Disputed Real Property is property of the estate under 11
20 U.S.C. § 541(a)(1) as of December 6, 2004;
- 21 2. Declaring that the Disputed Personal Property is property of the estate under
22 11 U.S.C. § 541(a)(1) as of December 6, 2004;

1 3. Ordering the Debtor to amend its Amended Statement of Financial Affairs and
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property
3 and the Disputed Personal Property are all property of the estate;

4 4. Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6 (Adv Complaint, p. 15)

7 By way of the Complaint, the Committee seeks to determine the property rights and
8 interests of not only St. Francis Xavier, but of 82 non-debtors. The Complaint seeks to
9 deprive those non-debtors of their instrumentalities used in religious worship, faithful
10 exercise of its mission, activities, and ministries.

11 **D. Motion for Avoidance Powers**

12 On February 7, 2004, the Committee filed a motion in the main case seeking
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.
(Main Case Docket No. 393)

16 **E. Motion for Summary Judgment**

17 The Committee filed the present motion for summary judgment ("Motion") on April
18 17, 2005. (Adv. Docket No. 63)

19 The Motion seeks specific relief defining title and ownership of at least 22 separate
20 parcels of real property which belong to at least 22 different and distinct Defendants.
21 Although the Committee's Motion indicates that they have restricted summary judgment to
22 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause
23 of action by way of an "alter ego" argument.

24 The Committee's Motion attempts to "lump" St. Francis Xavier's real property with
25 other Defendants' real property interests, dealing with all parcels of property collectively,
26 including all improvements and fixtures. However, each parcel of real property is a
separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,
2 and use. The committee's standardized factual scenario is inapplicable and not an
3 appropriate basis for declaratory relief against St. Francis Xavier.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)
8 separate grounds.

9 1. Nothing contained within the express language of Section
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a
creditors committee to file suit against non-debtors to define a non-debtor's
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject
12 matter jurisdiction over the claims alleged in the Committee's Complaint
13 because there is no case or controversy between the Committee and the
Parishes within the meaning of the Declaratory Judgment Act and Article III of
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of
23 separate legal entities. The Complaint does not present a federal question nor is there
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-
25 debtor defendants. As such, it could have easily been brought in state Superior Court
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, St. Francis Xavier does not consent to
2 entry of Findings of Fact and Conclusions of Law and does not waive defenses related to
3 Plaintiff's standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

4 IV.

5 STATEMENT OF FACTS

6 The original Church of St. Francis Xavier Parish was built and donated to the
7 Parishioners of the Lidgerwood neighborhood of Spokane by the Jesuits in 1906. (Aff. D.
8 Barnett ¶ 4, Ex. A) The announcement of the new Church was made on November 18,
9 1906, and the first mass was celebrated on November 25, 1905. (Aff. D. Barnett ¶ 4, Ex.
10 A) The dedication of the new Parish Church took place on December 2, 1906. (Aff. D.
11 Barnett ¶ 4, Ex. "A")

12 St. Francis Xavier Parish was a Jesuit Parish until 1923, at which time it was
13 transferred from the care of the Jesuits to the care of the Diocese of Spokane. (Aff. D.
14 Barnett ¶ 4) Prior to the transfer of legal title to the Catholic Bishop of Spokane, a
15 corporation sole, St. Francis Xavier paid all money owing to the Jesuits. (Aff. D. Barnett ¶
16 5, Ex. B)

17 St. Francis Xavier's Christian faithful ("Parishioners") consist of 323 households,
18 approximately 541 individuals, most of whom reside within the geographical community of
19 the Lidgerwood neighborhood. (Aff. Barnett ¶ 10) These individuals make up the Parish of
20 St. Francis Xavier. (Aff. D. Barnett ¶ 10)

21 The Parish currently owns the beneficial interest of lots 1-6, 21-24, of Block 85,
22 Lidgerwood Park Addition, Spokane Washington, which lie between Empire Avenue, and
23 Providence Avenue, abutting Standard Street. (Aff. D. Barnett ¶ 8) Of these lots, lots 1, 2,
24 3, 4, 21, 22, 23, and 24, along with lot 20, were transferred in 1927 from The Pioneer
25 Educational Society, a missionary corporation of the Jesuits. (Aff. D. Barnett ¶ 5)

26 A deed to lot 4, was executed in 1946 transferring this property from the City of
Spokane to the Catholic Bishop of Spokane, a corporation sole, for the amount of \$135.00.
This money was raised and paid by the Parish, through its Parishioners. (Aff. D. Barnett ¶
6, Ex. C) In 1948, a deed to lots 5, and 6 was executed transferring this property from the

1 City of Spokane to the Catholic Bishop of Spokane, a corporation sole, for the amount of
2 \$350.00. This money as well was raised and paid by the Parishioners. (Aff. D. Barnett ¶ 7,
3 Ex. D) At the times of these transfers, there was no confusion between the Diocese and
4 St. Francis Xavier Parish that the Diocese held record legal title to the property and that the
5 Parish owned and held the beneficial use of the property. (Aff. D. Barnett ¶ 16)

6 In 1961 a deed to lot 17 in Block 92 of Lidgerwood Park Addition was executed
7 transferring this property from Wilma Deering Shannon and James Shannon to the Catholic
8 Bishop of Spokane, a corporation sole. (Aff. D. Barnett ¶ 15) The purchase price for which
9 was paid by St. Francis Xavier Parish. (Aff. D. Barnett ¶ 15, Ex. J) At the time of this
10 transfer there was no confusion that the legal title to the property was held by the Diocese,
11 with the beneficial use of the property being retained by the Parish. (Aff. D. Barnett ¶ 15,
12 Ex. K)

13 St. Francis Xavier has owned various other lots of property on Blocks 95 and 92.
14 (Aff. D. Barnett ¶ 13) These lots have since been sold by St. Francis Xavier. (Aff. D.
15 Barnett ¶ 13) At the time, the Diocese acknowledged that the Parish was the rightful owner
16 of the lots, and agreed to cooperate in the completion of the paperwork necessary to
17 transfer title. (Aff. D. Barnett ¶ 16, Ex. L).

18 Prior to its sale, lot 19 of Block 85, commonly known as 533 E. Providence, was
19 leased by St. Francis Xavier Parish, in its own name, to various lessors, and St. Francis
20 Xavier served as landlord with respect to the property. (Aff. D. Barnett ¶ 13) Amongst the
21 lessors who signed contracts for the lease of the real property with St. Francis Xavier
22 Parish were: Fred Simons, May Hoyt, Helena Owens and Thomas Harty. (Aff. D. Barnett ¶
23 13 Ex. H)

24 Prior to its sale, lot 20 of Block 85, commonly known as 537 E. Providence, was
25 leased by St. Francis Xavier Parish, in its own name, to various lessors, and St. Francis
26 Xavier served as landlord with respect to the property. (Aff. D. Barnett ¶ 13) Amongst the
27 lessors who signed contracts for the lease of the real property with St. Francis Xavier
28 Parish were: Margery Johnson and Dawn Hughes. (Aff. D. Barnett ¶ 13 Ex. H)

29 Another parcel formerly owned by St. Francis Xavier Parish was Lot 12 in Block 93,
30 commonly known as 604 E. Providence, to which legal title was recorded in the name of

1 the corporation sole, was clearly gifted to St. Francis Xavier Parish for St. Francis to use as
2 it deems in is the best use of the Parish. (Aff. D. Barnett ¶ 14, Ex. I).

3 The Parishioners of St. Francis Xavier is community that has worked together as a
4 family. (Aff. E. Finley ¶ 3) St. Francis Xavier has worked as a “do it ourselves” group of
5 Parishioners to improve its real property. (Aff. E. Finley ¶ 3) The Parishioners raised the
6 funds necessary to manage the building projects of St. Francis Xavier over the years. (Aff.
7 E. Finley ¶ 3) The members of St. Francis Xavier have given money to St. Francis Xavier
8 with the intention and understanding that the money was being used for the exclusive
benefit of St. Francis Xavier. (Aff. E. Finley ¶ 7, 8)

9 St. Francis Xavier has paid all the consideration for all of the property it holds and
10 currently in issue in the Committee's motion, and holds the beneficial interest in the
11 property with legal title being recorded in the name of the Catholic Bishop Of Spokaen, a
corporation sole. (Aff. D. Barnett ¶ 5-8)

12 Consistent with its ownership of the real property, St. Francis Xavier, through its
13 Parishioners, has paid all insurance premiums, completed and paid all fees with tax exempt
14 forms related to the real property. (Aff. D. Barnett ¶¶ 9, 12,)

15 In addition to holding a beneficial and equitable ownership interest in the real
16 property in question, St. Francis Xavier clearly exists as its own independent entity, and
17 has been treated as an independent entity by the Debtor. (Aff. D. Barnett ¶ 22) Under
18 Canon Law, St. Francis Xavier is a separate and distinct legal entity known as a juridic
19 person. [Canons §113-115, §515] Under Civil Law, St. Francis Xavier is an
unincorporated association. (Committee's Statement of Undisputed Fact, No. 23)

20 In addition to its prior leasing of real property in its own name, St. Francis Xavier has its
21 own employs. (Aff. D. Barnett ¶ 20) The employees were hired by the Pastor, Rev. Daniel
22 J. Barnett, and are paid from St. Francis Xavier's account with U.S. Bank. (Aff. D. Barnett ¶
23 20, 18) St. Francis Xavier is the direct employer of each individual, and has a federal tax
24 ID number under which the employee's withholdings are reported. (Aff. D. Barnett ¶ 20) St.
25 Francis Xavier banks participates in the Diocesan Deposit and Loan Program. (Aff. D.
26 Barnett ¶ 17) The money deposited is traceable to St. Francis Xavier bank accounts and
then back to donations from Parishioners. (Aff. D. Barnett ¶ 17)

1 Along with the bank account St. Francis Xavier Parish has a credit card. (Aff. D.
2 Barnett ¶ 18) These accounts are used to manage the purchase of goods and services St.
3 Francis Xavier Parish requires and receives, and for which St. Francis Xavier is billed
4 directly from numerous independent vendors. (Aff. D. Barnett ¶ 21) These accounts are in
5 St. Francis Xavier's name exclusively, and only the Pastor, or trusted members of the
6 Parish have ever been signatories on the accounts. (Aff. D. Barnett ¶ 18) These accounts
7 are referenced by St. Francis Xavier's own TIN. (Aff. D. Barnett ¶ 18)

8 St. Francis Xavier has, since its inception exclusively used, independently
9 maintained and improved the real property owned by St. Francis Xavier through the weekly
10 collections, tithes, gifts, and capital campaigns. (Aff. D. Barnett ¶ 11, Aff. E. Finley ¶ 3, 7)
11 The financial strength or weakness of a parish is dependent almost entirely upon its
12 Christian faithful. (Aff. D. Barnett ¶ 11) Offerings, gifts, and tithes are made by Parishioners
13 of the Parish, for the financial well being of the Parish. (Aff. D. Barnett ¶ 11; Aff. E. Finley ¶
14 7,8)

15 Contrary to the Committee's conclusions, the facts demonstrate St. Francis Xavier is
16 its own legal entity and is the true owner of all equitable and beneficial interest of the real
17 property identified as "St. Francis Xavier" by the Committee. There can be no doubt but
18 that the real property in issue is held in trust for the benefit of St. Francis Xavier.

19 V.

20 STANDARDS OF REVIEW

21 A. Declaratory Judgment Standard.

22 The Committee glosses over the fact that the relief it seeks is entirely declaratory in
23 nature. A declaratory judgment action is ripe for adjudication only where an "actual
24 controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000).
25 "As a general rule, an actual controversy exists where 'a substantial controversy of
26 sufficient immediacy and realty [exists] between parties having adverse legal interests.'"
27 Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir.
1986).

1 Although some Bankruptcy Courts have entertained declaratory judgment actions
2 filed by trustees when the ownership interest of an asset was in dispute which the trustee
3 asserted was property of the estate on the petition date, the present case is not advanced
4 by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11th
5 Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v.
6 Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505
(Bankr. S.D. Fla. 1987).

7 There is no legal relationship between St. Francis Xavier, the Committee, or any
8 Committee members. Furthermore, there is no legal dispute between St. Francis Xavier
9 and the Debtor regarding the ownership interests in real property or trust relationship
10 between the Debtor and St. Francis Xavier. It is correctly described and defined in the
11 Debtor's Statement of Affairs in accordance with the relationship between the parties as
12 established by Canon Law and Civil Law. As such, no actual controversy between parties
13 with adverse legal interests exists.

14 **B. Summary Judgment Standard.**

15 The party moving for summary judgment has the burden to show that he is entitled
16 to judgment under established principles; and if he does not discharge that burden, he is
17 not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142,
18 90 S. Ct. 1598 (1970).

19 In determining whether there are any genuine issues of material fact, the Court must
20 view the evidence in the light most favorable to the nonmoving party. Summers v. A.
21 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). The party opposing summary
22 judgment to survive the motion need only present evidence from which a jury might return a
23 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at
24 1039, citing Anderson v. Liberty Lobby, Inc.

25 The Committee has failed to produce any evidence to support its contention that the
26 beneficial and equitable ownership of the real property does not belong to St. Francis
Xavier.

1 However, St. Francis Xavier has not only produced reasonable evidence as to a
2 material issue of fact as to its ownership interest in the real property, it has also produced
3 overwhelming evidence that St. Francis Xavier is the true owner of the real property in
4 question.

5
6 **VI.**
7 **LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF**
8 **CONCERNING REAL PROPERTY OWNERSHIP**

9 **A. Whether Applying Civil Law Or Canon Law, St. Francis Xavier Parish Is**
10 **A Separate And Distinct Legal Entity.**

11 The Committee has conceded that Parishes are unincorporated associations.
12 (See, Committee Statement of Undisputed Fact No. 23) The Committee's
13 acknowledgment of St. Francis Xavier's status as a separate legal entity from the
14 Debtor is consistent with both Civil and Canon Law.

15 **1. Washington Law Recognizes St. Francis Xavier As A Legal Entity.**

16 The Parish, as an unincorporated association, is a separate legal entity under
17 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian
18 faithful ("Parishioners") of each Parish are the residents of their local community. They are
19 residents of cities, towns, and counties within Eastern Washington, in some cases they are
20 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group
21 pursuing a common purpose. In the case of each parish, the common purpose is the
22 fulfillment of their religious tenets.

23 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,
24 without a charter, formed by mutual consent for the purpose of promoting common
25 enterprise or prosecuting common objective. An organization composed of a body of
26 persons united with a charter for the prosecution of a common enterprise." *Black's Law*
Dictionary, 1531 (6th 1991). This is a broad definition, and Washington has recognized that
"associations vary in their nature." Riss v. Angel, 131 Wn.2d 612, 635 (1997).

1 Washington's case law recognizes a variety of forms of unincorporated associations,
2 including groups of individuals of a particular religion or creed. See Bacon v. Gardner, 38
3 Wn.2d 299 (1951), Church of Christ v. Carder, 105 Wn.2d 204 (1986).

4 Unincorporated associations clearly have the ability to hold the equitable interests of
5 a trust and defend that interest in court. Leslie v. Midgate Center, Inc., 72 Wn.2d 977
6 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated
7 associations to be parties to lawsuits. Bacon v. Gardner, 38 Wn.2d 299, 304 (1951); State
8 v. Bothell, 89 Wn.2d 862, 866 (1978); see also Church of Christ v. Carder, 105 Wn.2d 204,
9 206 (1986); Riss, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the
10 capacity to appear and represent their interests in declaratory judgment actions. RCW §§
11 7.24.110 - .130 (West 2005). It is well settled law that unincorporated associations have
12 the ability to represent the interests of their members in legal actions. See, State v. Bothell,
13 89 Wn.2d at 866.

14 It is important to note that not a single case quoted by the Committee in support of
15 its assertion that each Parish is not a legal entity is from the state of Washington.
16 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

17 The capacity of an individual, other than one acting in a representative
18 capacity, to sue or be sued shall be determined by the law of the individual's
19 domicile. The capacity of a corporation to sue or be sued shall be determined
20 by the law under which it was organized. In all other cases capacity to sue or
21 be sued shall be determined by the law of the state in which the district court
22 is held

23 As a matter of law, unincorporated associations can be sued under Washington law.
24 The various cases cited by the Committee have no precedential value here in Washington.
25 The Committee's argument that St. Francis Xavier does not have a legal existence
26 separate from the Diocese fails as a matter of law. It is also inconsistent with Committee's
Statement of Undisputed Fact No. 23.

2. St. Francis Xavier Is A Separate Legal Entity Under Canon Law.

The Law of the Roman Catholic Church ("Church") has been in existence since the
first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the

1 extent the resolution of this matter requires a determination of the relationship between the
2 Debtor and St. Francis Xavier in their methods of governance, interaction or management,
3 compulsory deference is required to the provisions of the Code of the Canon Law which
4 govern these religious organizations under applicable law. The Supreme Court, when
5 faced with issues involving the Roman Catholic Church, has stated:

6 In the absence of fraud, collusion or arbitrariness, the decisions of proper
7 church tribunals on matters purely ecclesiastical, although affecting civil
8 rights, are accepted in litigation before the secular courts as conclusive,
9 because the parties in interest made them so by contract or otherwise. Under
10 like circumstances, effect is given in the courts to the determination of the
11 judiciary bodies established by clubs and civil associations.

12 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, ____ S.Ct. ____, 74 L.Ed.131,
13 137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (____)).

14 This legal principle has been clearly adopted by the Washington State Supreme
15 Court, when addressing real property interests involving a hierarchal church. See,
16 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of
17 Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.
18 App. 814 (1982) (All applying the compulsory deference rule established in Watson to
19 disputes involving church property.)

20 In this case, the identity of the Parish, the Parishioners, the Debtor, and their
21 relationship to their property rights are defined within Canon Law. These relationships, are
22 "purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation
23 before secular courts as conclusive[.]" Gonzalez, 280 U.S. at 16, ____ S.Ct. at ____, 74 L.Ed.
24 at 137.

25 Within the Church, besides physical persons, there are also juridic persons, that is,
26 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon
113(2)) A juridic person is an artificial person distinct from all natural persons or material
goods. Like a civil law corporation, it is a legal entity which can and must be conceived
apart from the natural persons who constitute it, administer it, or for whose benefit it exists.
See L. Chiappetta, Il Codice d. Diritto Canonico. Comento Giuridico-Pastorale, 2nd ed.

1 (Rome: Dehoniane, 1996) 1:169; Robert Kennedy, New Commentary on the Code of
2 Canon Law (Paulist Press 2000).

3 Canon Law provides that:

4 A parish is a certain community of the Christian faithful stably constituted in a
5 particular church, whose pastoral care is entrusted to a pastor as its proper
6 pastor under the authority of a diocesan bishop. (Canon 515(1))

7 Canon 515(3) states:

8 A legitimately erected parish possesses juridic personality by the law itself.
9 (Canon 515(3))

10 In this case, there is no dispute that St. Francis Xavier is a legitimately erected
11 Parish and a juridic person under Canon Law.

12 Canon Law is clear that property acquired by a Parish belongs to the Parish.
13 Specifically, Canon 1256 states:

14 Under the supreme authority of the Roman Pontiff, ownership of goods
15 belongs to that juridic person which has acquired them legitimately. (Canon §
16 1256)

17 Since its inception, the Christian faithful themselves, which constitute the Parish,
18 have acquired both real and personal property which is used by the Christian faithful in their
19 fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used
20 by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)
21 The juridic person (Parish) may not be deprived of its property without consent and
22 approval. (See Canons 1281–1288 and 1291-1295)

23 **3. Committee Waived Argument on Individual Parish Standing.**

24 The Committee's decision to name and sue St. Francis Xavier and 81 other Parishes
25 individually is evidence of the separate legal identity of each parish. Furthermore, the
26 Committee admits that St. Francis Xavier is a separate unincorporated association in its
Statement of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a
party from taking divergent positions in different legal proceedings. Wagner v. Proff
Engineers in California Court, 354 F.3d 1036, 1044 (9th Cir. 2004).

1 In addition, the request for relief in the Complaint seeks substantive consolidation of
2 St. Francis Xavier with the Debtor. Substantive consolidation in bankruptcy terms is the
3 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229
4 F.3d 750 (9th Cir. 2000)) As such, the Committee has already recognized the legal identity
5 of St. Francis Xavier is separate and apart from the Debtor. The Committee should be
6 estopped from taking a contrary position for purposes of its Motion.

7 **4. Judicial Estoppel Does Not Apply to St. Francis Xavier.**

8 St. Francis Xavier does not dispute the definition of judicial estoppel submitted by
9 the Committee which is designed to prevent a party from taking divergent positions in
10 different legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v.
11 Prof. Engineers in California Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004). However, the
12 Committee fails to present a full recitation of the elements required for a finding of judicial
13 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.

14 The United States Supreme Court recently listed three factors that
15 courts may consider in determining whether to apply the doctrine of judicial
16 estoppel.

17 First, a party's later position must be "clearly inconsistent" with its
18 earlier position. Second, courts regularly inquire whether the party has
19 succeeded in persuading a court to accept that party's earlier position, so that
20 judicial acceptance of an inconsistent position in a later proceeding would
21 create "the perception that either the first or the second court was misled[.]"
22 Absent success in a prior proceeding, a party's later inconsistent position
23 introduces no "risk of inconsistent court determinations," and thus no threat to
24 judicial integrity. A third consideration is whether the party seeking to assert
25 an inconsistent position would derive an unfair advantage or impose an unfair
26 detriment on the opposing party if not estopped. In enumerating these
factors, we do not establish inflexible prerequisites or an exhaustive formula
for determining the applicability of judicial estoppel. Additional considerations
may inform the doctrine's application in specific factual contexts.

23 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9th Cir. 2001), citing New
24 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The
25 application of judicial estoppel is appropriate to bar litigants from making incompatible
26

1 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,
2 605 (9th Cir. 1996).

3 The position taken by St. Francis Xavier is not inconsistent with the holding of the
4 cases cited by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en banc*),
5 the case was actually filed by the individual members of St. Patrick's Parishioners and
6 Friends of Historic Preservation. Of the seven members, six were members of the Parish.
7 Id. at 196. The issue arose when the "St. Patrick Building Committee," a parish committee,
8 applied for a demolition permit related to St. Patrick School. This was a case of historic
9 preservation interests vs. parish building committee interests, Parishioner v. Parishioner.
10 Id. at 194-199. The case holding invalidated a statute that was being used by a non-
11 parishioner in an attempt to stop a building project advanced by a parish building
12 committee for the furtherance of the Church's fundamental right to exercise religion. The
13 ordinance was found to have a coercive effect on the practice of religion.

14 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.
15 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have
16 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the
17 Court of Appeals and should not be considered in the trial courts. They do not become a
18 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668
19 (1971)(emphasis added).

20 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based
21 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its
22 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in
23 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with
24 the current position taken by the Diocese and the Parishes. There is no assertion or
25 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the
26 Diocese and the Parishes assert that the Diocese holds an ownership interest in the
property, but holds that interest in trust for the Parishes. This is not an inconsistent
position. Rather, the ownership status of the Bishop in Miller was never addressed or
litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's
earlier position" because the **nature** of the Bishop's ownership interest was never at issue.

1 Therefore the current position, which is consistent with the prior position, introduces no risk
2 of inconsistent court determinations.

3
4 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic**
5 **Bishop of Chicago and Oregon Case Law is Misplaced.**

6 First, both Oregon and Illinois apply a neutral principle of law approach to church
7 property issues. When examining church property disputes, Washington applies the more
8 stringent approach of compulsory deference. Furthermore, the legislative histories and
9 governing statutes concerning corporate soles is much different than that of Washington.

10 F.E.L Publications was a seventh circuit case which decided the issue on the legal
11 relationship between the Diocese and the Parishes within it in order to resolve a claim
12 against the diocese for tortious interference with a business relationship. There the Court
13 held that it was impossible for the cause of action to be based on the Diocese's directives
14 to the Parishes as those Parishes had no independent status, and were in fact "subsumed
15 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied
16 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41
17 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)
18 and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily
19 relied upon was Galich, however, that issue was not before the court in Galich.

20 In Galich, the Court held that the statute under which the Bishop of Chicago
21 incorporated did not create a statutory trust for the benefit of the Parishioners bringing the
22 case. Further, the Court held that any determination of the ability or inability of the Bishop
23 to demolish a church would violate the First Amendment.

24 The statute under which the case was decided was subsequently amended. As
25 amended, it includes a great deal of language indicating a legislative intent to create a trust
26 for the benefit of the religious congregation for whom the corporation is formed.

The other cases relied upon by the F.E.L. Court only support its conclusion by
inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip
and fall case at a Catholic school. While the issue was not addressed by the Court in
Haymes, the implication is that the Catholic school could not have been the proper

1 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged
2 the validity of a local zoning ordinance precluding the creation of a cemetery in the space
3 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic
4 Bishop was the only party which could have brought the action does this case support the
5 conclusion reached by the F.E.L. Court.

6 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real**
7 **Property At Issue.**

8 The Committee argues in its Complaint and subsequent Motion that by virtue of its
9 interpretation of law and facts that St. Francis Xavier's real and personal property is
10 property of the Debtor's bankruptcy estate. However, this argument is not substantiated.
11 Section 541 of the Bankruptcy Code specifically excludes from the estate property to which
12 the Debtor holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. §
13 541(b), (c), and (d))

14 The concept of trust relationships, bare legal title, and beneficial/equitable ownership
15 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor
16 holds mere legal title to property and a non-debtor holds the beneficial or equitable
17 ownership of that property, said property is not property of the estate. See Matter of
18 Torrez, 63 BR 751, 754-55 (9th Cir. BAP 1986)(imposition of resulting trust appropriate
19 since title was only put in children's name to avoid certain restrictions in a government
20 program); Sale of Guar. Corp, 220 BR 660, 664 (9th Cir. BAP 1998)(where the transferee of
21 property does not pay the purchase price for the property, the transferee is presumed to
22 hold the property in a resulting trust for the party who paid the consideration for its
23 purchase).

24 The standard of inquiry under section of the Bankruptcy Code excluding from
25 property of the estate trust interests that are subject to transfer restrictions enforceable
26 under applicable non-bankruptcy law, normally has three parts:

- 24 (1) whether the debtor has a beneficial interest in a trust;
- 25 (2) whether there is a restriction on the transfer of that interest; and
- 26 (3) whether the restriction is enforceable under non-bankruptcy law.

1 In re Wilcox, 233 F.3d 899 (6th Cir. 2000)

2 The evaluation of each element is resolved in accordance with and through the
3 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed 2d
4 136, 141-42 (1979).

5 Washington law clearly establishes that the Debtor holds only "bare legal title" to the
6 property in question. St. Francis Xavier is the true beneficial and equitable ownership of
7 the real property in dispute.

8 **1. St. Francis Xavier Parish Is The Beneficiary Of A Statutory Trust,**
9 **Holding All Equitable And Beneficial Interest In The Real Property.**

10 The corporation sole statute in Washington clearly and explicitly creates a statutory
11 trust comprised of the disputed property held for the benefit of the Church and its
12 parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

13 The legislative history is absolutely clear that the statute was enacted to create a
14 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was
15 entitled:

16 An Act providing for the organization of corporations sole, defining their
17 powers, authorizing them to transact business and hold property in trust for
18 religious denominations societies or churches.

19 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,
20 it was referred to the Senate Committee on Corporations other than Municipal. Id. After
21 review by the Committee, recommended that the bill be passed the Senate on March 6,
22 1915.

23 The bill was subsequently passed by the house on March 10, 1915, and was
24 approved by the Governor March 15, 1915.

25 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and
26 Powers of Corporations Sole."

Section 3 specifically states:

... Provided, all property held in such official capacity by such bishop,
overseer or presiding elder, as the case may be, shall be in trust for the use,
purpose, benefit, and behoof of his religious denomination, society or church.

1 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

2 As a corporation sole, the Debtor has the power to contract, sue, and be sued in
3 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in
4 real and personal property in the same manner as any natural person. Id. This grant of
5 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The
6 trust is comprised of all the property held by the Debtor in its official capacity. RCW §
7 24.12.030 (West 2005). Specifically the statutes state:

8 ...All property held in such official capacity by such bishop, overseer or
9 presiding elder as the case may be, shall be in trust for the use, purpose,
10 benefit and behoof of his religious denomination, society or church.

11 RCW § 24.12.030 (West 2005).

12 Every corporation sole shall, for the purpose of the trust, have the power to
13 contract in the same manner and to the same extent as a natural person, and
14 may sue and be sued, and may defend in all courts and places, in all matters
15 and proceedings whatever, and shall have authority to borrow money and
16 give promissory notes therefor, and to secure the payment of the same by
17 mortgage or other lien upon property, real and personal; ...

18 RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal
19 relationship between the Debtor, St. Francis Xavier, and Parishioners as a relationship of
20 trustee and beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent with
21 the norms of Canon Law which provide that each parish is a Church capable of acquiring
22 and owning real and personal property interests.

23 Despite this clear statute and governing principles of Canon Law, the Committee
24 misconstrues Washington case law explicitly recognizing the restrictions existing on
25 property impressed with a trust by dedication to religious organizations for the benefit of
26 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386
(1943), cited by the Committee, the Court explicitly notes that while the alienation of the
property in that case was within the power of the trustee, the use of the proceeds from the
sale could not be diverted from the benefit of the religious purposes for which the property
was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the
purpose of respondents was to divert the funds to be received from the sale of the property
to other than religious purposes of the Episcopal Church, the court could and would enjoin

1 them. The trustee is merely the holder of the legal title.”) Even the court’s explicit holding,
2 quoted only in part by the Committee, recognizes that courts will ensure that property of a
3 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose
4 for which the trust is held. Id. at 386. Specifically, the court stated: “For in a trust of the
5 character involved here, where no restraint is imposed on the right to alienate, the courts
6 will not interfere further than to see to it that the proceeds from the sale of the trust property
7 are not diverted from the use for religious purposes of the faith or denomination to which
8 the property was dedicated.” Id. (emphasis added).

9 Despite the Committee’s assertion that “[t]he corporation sole statute’s ‘trust’ for the
10 Church is no different than the trust in Wilkeson ...” (Committee’s Memo, p. 11) the
11 Committee disregards the court’s explicit statements upholding restrictions on the use of
12 the trust res and its proceeds, and identifying that “[t]he trustee is merely the holder of the
13 legal title.” Id. at 385. The Committee’s memorandum repeatedly fails to distinguish
14 between the rights and obligations of a trustee as the legal title holder of property, and the
15 existence of an equitable interest in the property, attempting instead, to equate the holding
16 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.
17 This merely evidences a lack of recognition of the distinction between legal title and an
18 equitable interest, and does not support the Committee’s argument that no trust exists.

19 The Catholic Bishop of Spokane is the trustee of the statutory trust created under
20 RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the
21 power to alienate certain property of the trust, any such alienation must be for the “benefit
22 and behoof of his religious denomination, society or church.” RCW § 24.12.030 (West
23 2005). With regard to “proceeds from the sale of the trust property,” they “are not to be
24 diverted from the use for religious purposes of the faith or denomination.” Wilkerson, 176
25 Wash. at 386. The statutory trust under which the property is held reserves the beneficial
26 use of the property for St. Francis Xavier.

2. St. Francis Xavier Is The Beneficiary Of An Express Trust.

The recognition and observance of the civil duties of a trustee have been impressed upon the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated

1 as a corporation sole under the foregoing statute on July 3, 1915. With respect to St.
2 Francis Xavier Parish, this trust relationship commenced in with the transfer of the Parish
3 property to the Diocese. The Washington Supreme Courts has noted that statements in
4 articles of incorporation can be sufficient to create an express trust. Hoffman v. Tieton
5 View Methodist Church, 33 Wn.2d at 727 (1949) ("There is no question in our minds but
6 that all property acquired by Tieton View was, under article VIII of its articles of
incorporation ... held in trust for the uses of the Methodist Church...").

7 The articles of incorporation clearly express the intent of creating and maintaining a
8 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles
9 expressly provide:

10 ARTICLE III

11 This corporation is formed for the purpose of transacting business and
12 **holding property in trust** for that certain religious denomination or society
13 known as the Roman Catholic Church; to do business and contract in the
14 same manner and to the same extent as a natural person; to borrow money
and give promissory notes therefor, and to secure the payment of the same
by mortgage or other lien upon property real and personal; to buy, sell, lease,
mortgage, and in every way use and deal in real and personal property and to
receive bequests for its own use or upon trusts.

15 ARTICLE IV

16 The incorporator of this corporation is Augustine F. Schinner, who is the duly
17 appointed, qualified and acting Roman Catholic Bishop of the Diocese of
18 Spokane, in the state of Washington, and who as such Bishop of the Roman
19 Catholic Church has subscribed these Articles of Incorporation, in order to
20 become a corporation sole, together with his successors in office by his
official designation, in the manner prescribe in "An Act Providing for the
Organization of Corporations Sole, Defining Their Powers, **Authorizing them**
to transact business and hold property in trust for religious
denominations, societies or churches." passed by the Legislature of the
State of Washington and approved by the Governor, March 15th, 1915.

21 ARTICLE V.

22 This incorporation is a religious corporation, not organized for gain and is
23 without capital stock, **all property held by it being in trust** for the use,
24 purpose, benefit and behoof of the Roman Catholic Church of the Diocese of
Spokane, in the State of Washington.

25 (Articles of Incorporation, 713115, Emphasis Added)

1 An express trust "arises because of the expressed intent and involves a fiduciary
2 relationship in which the trustee holds property for the benefit of a third party." Goodman v.
3 Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly
4 expressed the intent to hold property in trust for the benefit of the Parishes of the Church of
5 the Diocese of Spokane.

6 A trust will be found to exist if there is a clear manifestation of an intent to create a
7 trust; and the entire instrument, as well as its general purpose and scope, should be
8 considered, and the instrument should be construed in light of the circumstances
9 surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726
10 (1949).

11 In this case, the trust instrument consists of the deed, which contains explicit
12 language referencing the fact title is held by a "Corporation Sole." The statute governing
13 corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship
14 exists.

15 Just as use and occupancy of property is sufficient to place others on notice of the
16 possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the
17 failure of a spouse to record an interest in community property does not preclude that
18 spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531
19 (1937)), the use, improvement and maintenance by St. Francis Xavier of property recorded
20 in the name of a corporation sole, places the world on notice of the statutory trust under
21 which it is held, and identifies the true nature of the Debtor's interest in the property. Cf. In
22 re Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory
23 trust, and noting that such a finding creates no burden on creditors "[a]s opposed to
24 contractual or implied trusts, the stature is public. There is no secret agreement between"
25 the parties.).

26 **3. Statute Of Frauds Does Not Make The Express Trust In This Case Defective.**

Generally, the statute of frauds will prevent parol evidence from enforcing the terms
of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.

1 356, 365 (1994). An exception to the requirement for an express trust over real property is
2 a situation where a beneficiary of the trust has partially performed in accordance with the
3 trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.
4 Sanders, 100 Wn.2d 853 (1984).

5 The standard for evaluating partial performance is whether the beneficiary, with the
6 consent of the trustee:

- 7 a. Enters into possession of the land;
- 8 b. Makes improvements to the land; and
- 9 c. Changes position in reliance of the trust.

10 See, Diel at 144-145.

11 As demonstrated in the Statement of Facts in this Memorandum (Section IV), St.
12 Francis Xavier and its parishioners have held possession of the property to the exclusion of
13 all others since its inception. St. Francis Xavier has made all improvements to the land
14 and maintained the structures thereon. All donations have been received with the
15 understanding that St. Francis Xavier improved the real property to fulfill religious tenets of
16 the Parish. Such actions were taken with the understanding the Church property was
17 property belonging to St. Francis Xavier. Additionally, the actual transfer in issue was
18 acknowledged and explicitly identified as a transfer of property in trust for the benefit of the
19 Parishioners by the former Pastor of the Parish executing the deed. (Aff. S. Barnufsky ¶ 5,
20 7) There can be no doubt but that the Debtor holds bare legal title to the real property
21 belonging to St. Francis Assisi Parish at issue in the Committee's motion.

22 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

23 The Committee's discussion of the administrative dissolution of nonprofit
24 corporations is wholly irrelevant to the enforceability of the restrictions placed on property
25 donated to St. Francis Xavier under Washington law. This is not an instance of an
26 administrative dissolution by the state, but a reorganization under Title 11 of the United
States Code. Further, St. Francis Xavier is subject to the Uniform Management of
Institutional Funds Act, RCW Chapter 24.44, which provides only two methods for the
release of a restriction placed on donations. RCW § 24.44.060.

1 Under Washington law, donations given with restrictions as to their use, to
2 incorporated or **unincorporated organizations operated for religious**, educational, or
3 other eleemosynary purposes, can only be used in accordance with the restrictions unless
4 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in
5 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)
6 impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General
7 be given notice and opportunity to be heard on any such matter before the Superior Court
8 makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.
9 *Id.* Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have
10 a long and well established tradition of honoring the intention of the donors and benefactors
11 of religious organizations.

12 The facts of this case demonstrate that the real property at issue was paid for with
13 donated funds, improved, and maintained with donated funds for the benefit of St. Francis
14 Xavier.

15 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not
16 Exist, A Resulting Trust Should Be Found In Favor Of St. Francis Xavier.**

17 Even if the statutory and express trusts are found to be ineffective, the acquisition
18 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where
19 property is taken in the name of a grantee other than the person advancing the
20 consideration, the one in whose name title is taken is a resulting trustee for the person who
21 paid the purchase price, in the absence of proof of a contrary intention." Mading v.
22 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to
23 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74
24 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).
25 "Similarly, where property is transferred to one person and the purchase price is advanced
26 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d
at 54. Resulting trusts are equitable in nature, and may be established by parole evidence
of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at
Section IV – Statement of Facts – all acquisitions of real and personal property, all

1 improvements, and all maintenance of the property was paid for with money directly
2 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and
3 intent that it was for the benefit of Parish property. Just as in the case of Matter of Torrez,
4 63 BR 751, 754-755 (9th Cir. BAP 1986), the imposition of a resulting trust is appropriate
5 since title was placed in the name of the corporation sole with the understanding it was held
6 in trust for St. Francis Xavier. The Bishop never intended to actually own the property or
7 assert control over the property or improvements as exclusive owner.

8 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**
9 **owed to St. Francis Xavier, A Constructive Trust Must Be Imposed.**

10 The facts surrounding the nature of the relationship between the Debtor, St. Francis
11 Xavier, and the acquisition of the property establish a constructive trust for the benefit of St.
12 Francis Xavier. "A constructive trust is an equitable remedy which arises when the person
13 holding title to property has an equitable duty to convey it to another on the grounds that
14 they would be unjustly enriched if permitted to retain it." Lakewood v. Pierce County, 144
15 Wn.2d 118, 126 (2001). A constructive trust will be "imposed when there is clear, cogent
16 and convincing evidence of the basis for impressing the trust." Id. To establish a
17 constructive trust, a "party must show the trust arose from the relationship of the parties
18 involved, and that the property justly belongs to that party." Id. at 129. Here, the intent of
19 the parties was to create valid statutory and express trusts, the beneficial use of the
20 property was at all times held reserved by and for St. Francis Xavier. Not only is there
21 clear, cogent and convincing evidence for the imposition of a trust, but for the Court to hold
22 that the property in dispute belongs to the Debtor would unjustly enrich the Debtor to the
23 detriment of St. Francis Xavier who has relied on its ownership of the property since the
24 parish was founded.

25 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law**
26 **And Fact.**

The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to
circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this

1 case, the Committee is asking the Court to rule that St. Francis Xavier is liable for the debts
2 of the Debtor, a corporation sole, even though St. Francis Xavier is a separate legal entity
3 and is clearly not a "shareholder" of the Debtor.

4 When Washington Courts invoke "piercing the corporate veil", they have applied the
5 "doctrine of corporate disregard" based upon two elements:

6 a. "The corporate form must be intentionally used to violate or evade a duty,"
7 and

8 b. "Disregard must be necessary and required to prevent unjustified loss to the
9 injured party."

10 See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d
11 689 (1982)

12 The first factor requires a showing of abuse of the corporate form, typically involving
13 fraud, misrepresentation, or other action **by the corporation that harms the creditor and**
14 **benefits the shareholder**. The second factor requires that the harm must actually occur.
15 In this case, the Committee has neither plead nor demonstrated any facts to support both
16 requirements of an "Alter Ego Claim."

17 The undisputed facts offered by St. Francis Xavier demonstrate a claim of "Alter
18 Ego" is without merit. (See Statement of Facts, Section IV)

19 **1. The Committee Attempts To Circumvent Statutory Prohibitions Against**
20 **Substantive Consolidation Of A Not "Moneyed" Entity.**

21 The Committee's Complaint, in its third cause of action, seeks a declaratory order for
22 substantive consolidation "all Diocese Related Entities." The Committee's Motion for
23 Summary Judgment now seeks a declaratory order under a theory of "Alter Ego." Such a
24 legal theory is nothing more than a thinly veiled attempt to place St. Francis Xavier and
25 other non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief
26 which is forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative
history. House Report No. 95-595, 95th Cong., 1st Sess 321 (1977).

The Bankruptcy Code clearly recognizes that not all debtors are the same. And
while Chapter 11 and its provisions do not generally distinguish between for-profit, non-

1 profit, and religious organizations for the purposes of reorganization, that is not to say that
2 a distinction does not exist and should not or cannot be made. For example, under the
3 Bankruptcy Code non-profit corporations are treated more favorably than for-profit
4 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from
5 involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case
6 filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has
7 recognized that religious organizations present unique bankruptcy issues because
8 government regulation of religion implicates First Amendment rights. For example, the
9 Bankruptcy Code has been modified by Congress to protect free exercise of religion to
10 prevent a trustee from avoiding a debtor's donation given to a religious or charitable
11 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.
12 L. No. 105-183, 112 Stat. 517 (1998).

13 Substantive consolidation has no express statutory basis, but rather, is a "product of
14 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2nd Cir. 1988).
15 Substantive consolidation results in pooling the assets of, and claims against, the two
16 entities, satisfying liabilities from the resultant common fund; eliminating inter company
claims; and combining creditors of the two companies for purposes of voting on
reorganization plans. In re Bonham, 229 F.3d 750, 764 (9th Cir. 2000).

17 In the present case, even if the Committee could get around the statutory
18 prohibitions, the Committee would have to demonstrate 1) that the Committee or its
19 members dealt with St. Francis Xavier Parish and the Debtor as a single economic unit and
20 did not rely on the separate credit of each of the entities; or that the operations of the
21 Debtor and St. Francis Xavier Parish were **excessively** entangled with the Debtor's affairs
22 to the extent that consolidation will benefit all creditors. See In re Bonham, 229 F.3d 750,
23 766 (9th Cir.).

24 The newly surfaced "Alter Ego" theory is nothing more than a recognition that
25 Committee's third cause of action has no application in this case.
26

1 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**
2 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**
3 **Act.**

4 The exercise of religion includes the “right to believe and profess whatever religious
5 doctrine one desires” and prevents the government from “lendi[ng] its power to one side or
6 another in controversies over religious authority or dogma.” See Smith, 494 U.S. at 877
7 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if
8 the government “substantially burdens” a person’s exercise of religion, and the government
9 does not demonstrate that it has a “compelling government interest” to justify the religious
10 burden, then the government intrusion into a person’s free exercise of religion has been
11 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later
12 limited Sherbert by holding that “the right of free exercise does not relieve an individual of
13 the obligation to comply with a ‘valid and neutral law of general applicability . . .’” See
14 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was
15 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42
16 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), “to restore the compelling interest test as set
17 forth in Sherbert,” and “to guarantee its application in all cases where free exercise of
18 religion is substantially burdened,” including cases in which the law at issue was of “general
19 applicability.” See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507
20 (1997), the Supreme Court declared RFRA unconstitutional as applied to state actions
21 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth
22 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA “intruded into an
23 area reserved by the Constitution to the States”). However, RFRA continues to be
24 constitutional as applied to federal law. See infra Part I.B.4.

25 Under RFRA, a neutral law of general applicability is an unconstitutional
26 infringement of a person’s free exercise rights if the following is true: (1) the law
substantially burdens a person’s exercise of religion; (2) the government cannot justify the
law with a compelling government interest; and (3) there are no less restrictive means of
furthering the government’s compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

1 Two unique circumstances arise would occur if the Court were to dictate the
2 ownership and use of Parish property: (1) a religious leader will have been replaced by a
3 government official as the head of a religious organization, resulting in comprehensive
4 government surveillance of religion, and (2) a government official will be in an
5 unprecedented position of decision making power over a church/Parish, a position
6 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in
7 the appearance of government endorsement of religion for the benefit of a creditor's
8 committee.

9 St. Francis Xavier's economic interests cannot be separated from its spiritual interest
10 – any economic decision the Court makes regarding use or ownership of property inevitably
11 has direct and significant religious consequences. Thus, the Court will become hopelessly
12 entangled with religious policy of the Catholic Church. The effect of St. Francis Xavier's
13 spiritual mission is that every financial decision it makes is driven by religious objectives
14 toward religious ends in accordance with Canon Law. This creates an irreconcilable church
15 versus state conflict between a non-debtor, a creditors committee, and the Court. By
16 effectively forcing a Parish into bankruptcy by way of declaratory relief, the government is
17 changing the essential structure of St. Francis Xavier under Canon Law. Since the Canon
18 directs the religious vision and thus the financial objectives of St. Francis Xavier, such a
19 change would essentially allow government to determine who benefits from St. Francis
20 Xavier's mission.

21 VII.

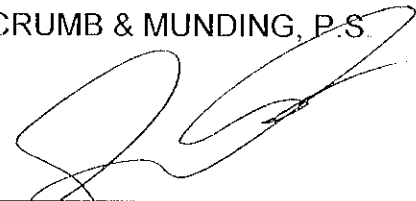
22 CONCLUSION

23 As a matter of law, the Committee has not established a case in controversy with St.
24 Francis Xavier that would permit the declaratory relief requested. Even if the Court were to
25 consider the pending motion for summary judgment based upon the Committee's factual
26 theory, the Committee's motion fails as the Committee has failed to eliminate material

1 questions of fact as to St. Francis Xavier's ownership interest in the real property, including
2 furnishing all consideration for purchase, improvements, and maintenance.

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4 DATED this 25th day of May, 2005.

5 CRUMB & MUNDING, P.S.

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